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No. 85-2029

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDDIE PADIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in selecting the portions of a government witness's testimony to be reread to the jury in response to the jury's note requesting clarification of that witness's testimony.

2. Whether petitioner had a legitimate expectation of privacy with respect to incriminating statements that he made during a telephone conversation even though petitioner, who was the caller, made the statements without first ascertaining the identity of the person who answered the telephone.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 787 F.2d 1071.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1986. The petition for a writ of certiorari was filed on June 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiring to possess and distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to ten years' imprisonment and a $10,000 fine.[1]

1. The evidence adduced at trial, as summarized in the opinion of the court of appeals (Pet. App. 1a-5a), showed the following. From October 20 through October 28, 1983, petitioner rented a room at the Memphis Airport Hilton Hotel in Memphis, Tennessee. Petitioner's co-defendant, Frank Carlin, the national president of the Iron Horseman Motorcycle Club, also resided at the hotel during that time. While at the hotel, petitioner and Carlin sold cocaine to John Kresser and Jamie McCloud. Pet. App. 1a-2a.

On October 24, 1983, petitioner leased a five-bedroom house located at 5162 Skippy Street in Memphis. Both the lease and the telephone were listed in petitioner's name. Petitioner, Carlin, and their respective girlfriends occupied the house during the month of October; co-defendant Terrance Sweigart and Christine Smock moved into the house in November. On approximately November 24, 1983, petitioner

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[1] Petitioner was acquitted on two counts of possession of cocaine and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); co-defendant Frank Carlin was convicted on one count of conspiring to possess and distribute cocaine and four counts of possession and distribution of cocaine; co-defendants Theodore Bottari and Terrance Sweigart both were convicted on the conspiracy count and on one possession and distribution count; and co-defendant Robin Lee Pettigrew was convicted on the conspiracy count and acquitted on one count of possession and distribution of cocaine. Pet. App. 5a.

moved to Chicago. He nonetheless continued to pay the rent for the Skippy Street house, and the telephone remained listed in his name. Pet. App. 2a.

Cocaine was shipped via Federal Express from "Dave's Harley" in Chicago to Carlin, his son, his girlfriend, and Christine Smock at the Skippy Street house. Federal Express records further revealed that an "Edward Peyton" and Jamie McCloud shipped packages from Memphis to undisclosed locations during the relevant time period. Pet. App. 2a; Tr. 1068-1071.[2] Other evidence showed that the Skippy Street house was a source of cocaine. For example, in November 1983 Kresser and McCloud sold Drug Enforcement Administration (DEA) undercover agent Kelly Goodowens one ounce of cocaine that they claimed to have obtained at the Skippy Street house. Pet. App. 2a-3a.

On December 21, 1983, Kresser and McCloud sold two additional ounces of cocaine to undercover agent Goodowens. The three subsequently began negotia-

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[2] Carlin's son was arrested on December 15, 1983, when he appeared at the Memphis Federal Express office to accept delivery of a package of cocaine. The Federal Express shipments of cocaine into Memphis were discontinued as of that date. Pet. App. 2a. Thereafter, the cocaine was delivered by messenger. Thus, Jamie McCloud testified that in January 1984 she went to the Skippy Street house to pick up cocaine for Kresser's customers. She met co-defendant Pettigrew, who told her that he had just arrived in Memphis with the cocaine but was late because of "snow and mechanical difficulties." Co-defendant Sweigart then arrived at the house and stated that he was glad they "sent it with somebody with some brains." He objected, however, to the fact that a "ringer" had been sent with Pettigrew, an apparent reference to an unknown man who at the time was playing pool with Pettigrew in the Skippy Street house. Tr. 549-551, 650-653.

tions for the sale of one or more pounds of cocaine. On January 17, 1984, Goodowens agreed to buy two pounds of cocaine; the transaction was to be consummated on January 20 at Katie's Kitchen, which was located in Memphis. Kresser later discussed the transaction with Carlin, who stated that he "would have to telephone 'up north for the cocaine.' " Pet. App. 3a.

McCloud, Kresser, and Goodowens met as planned at Katie's Kitchen on January 20, 1984. Kresser and Goodowens agreed to "split the sale." The court of appeals explained (Pet. App. 3a n.1) that "[i]n drug parlance, 'splitting the sale' is a procedure that guards against non-performance by one or more of the parties. In general, the procedure involves a four-stage transaction whereby (1) the purchaser displays the purchase money to the seller, (2) [t]he seller delivers one half of the cocaine, (3) the purchaser tenders one half of the purchase price, and (4) the seller returns with the second half of the cocaine at which time a simultaneous exchange of cocaine and money concludes the transaction." McCloud drove to the Skippy Street house and informed Bottari and Carlin of the agreed-upon procedure. Bottari and Carlin then put half the cocaine into a cardboard box and gave the package to McCloud. *Id.* at 3a.

McCloud returned to Katie's Kitchen with the package. Upon a pre-arranged signal, law enforcement officers then arrested Kresser and McCloud. The pair agreed to cooperate with the police and identified the Skippy Street house as the source of the cocaine. They warned the officers that there were weapons in the house and that the remaining cocaine would be destroyed if McCloud did not return within 30 minutes. The officers proceeded to Skippy Street, forcibly entered the house, and secured the premises until a search warrant was obtained. Pet App. 4a.

While the officers were waiting for the warrant, the telephone rang several times and Deputy Sheriff Gerald Peterson answered the telephone calls. One caller voluntarily identified himself as "Fast"—petitioner was known as "Fast Eddie"—and asked to speak to Sweigart. Peterson informed the caller that Sweigart was not at the house. The caller then asked Peterson if he knew "if my man from Chicago had arrived yet." The caller at no time asked the identity of the person answering the telephone. Pet. App. 4a. The evidence relating to the telephone call was introduced by the government at trial.

2. Toward the end of its deliberations, the jury sent the following note to the district court (Tr. 1383-1384):

> Want to see the testimony where Jamie McCloud said the guys on Skippy were mad because a "ringer" had been sent from Chicago with the cocaine. January 20—2 lb. deal.

During the enusing discussion, petitioner's counsel observed that the note indicated that the jury had misunderstood the evidence. He stated that the transcript would reflect that McCloud's testimony regarding a "ringer" did not describe a delivery of cocaine from Chicago on January 20. Tr. 1387-1388.

Before the district court determined the appropriate response to the jury's note, the jury foreman forwarded a second note, which stated (Tr. 1397):

> We feel that we are stuck without the testimony of Jamie McCloud concerning the "ringer."

The district court ruled that, because the jury's second note contained a limited request for information, it was appropriate to reread for the jury the portion of McCloud's direct testimony regarding the "ringer" (Tr. 1407, 1409-1410). The jury then heard the

testimony, which recited that after New Year's Eve McCloud met Pettigrew at the Skippy Street house and learned that he had just arrived from Indiana with cocaine (Tr. 1410-1413). After returning to the jury room, the jury sent a final note stating, "This was the information we needed" (Tr. 1415).

3. The court of appeals unanimously affirmed petitioner's conviction (Pet. App. 1a-15a). The court first rejected petitioner's claim that the district court should have suppressed the incriminating statements that he made in his telephone calls to the Skippy Street house. The court found that petitioner did not "exhibit[] a subjective expectation of privacy in the incriminating telephone conversation" (*id.* at 8a). It noted that petitioner "had moved from the house * * * and had relinquished control of the premises to others" (*ibid.*). Moreover, petitioner "knew that the [house] was being used as a drug distribution center, and, in the face of that knowledge, failed to determine the identity of his telephone conversationalist or impose any precautions calculated to ensure the confidentiality of the conversation at issue" (*ibid.*).

The court further concluded that, even if petitioner had a subjective expectation of privacy in the contents of the telephone conversation, his expectation could not be characterized as one that society is prepared to recognize as reasonable (Pet. App. 8a). The court found that "it was unreasonable for [petitioner] to attach an expectation of privacy to an indiscreet * * * conversation with an unidentified telephone conversationalist who accepted the call at a house known by him, Padin, to be a drug distribution center frequented by innumerable gang members and transient visitors" (*id.* at 9a).

The court of appeals also concluded that the district court had not erred by rereading McCloud's testimony

to the jury in response to the jury's notes. It observed that the district court "examined the transcript and determined that specific and limited excerpts of McCloud's testimony responded to the jury's request" and that the district court therefore did not "abuse[] its discretion in complying with the jury's request" (Pet. App. 11a).[3]

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioner first contends (Pet. 10-13) that the district court deprived him of a fair trial by failing to correct the misimpression regarding Jamie McCloud's testimony that was revealed by the notes from the jury. As a threshold matter, petitioner may not challenge the district court's response to the jury's notes because the district court adopted the course of action suggested by petitioner when it decided that a portion of the transcript should be reread to the jury.

In response to the first note from the jury, petitioner's counsel urged the district court to reread to the jury portions of the transcript that would eliminate the jury's impression that McCloud's testimony referring to a "ringer" related to either a person traveling from Chicago or the January 20, 1984, drug sale (Tr. 1387-1388). After the jury's second note, the district court directed the reporter to read a portion of McCloud's testimony so that the court and counsel could "see what the transcript shows" (Tr.

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[3] The court of appeals also rejected petitioner's claim that the district court erred by denying his request under the Jencks Act for a DEA agent's report summarizing an interview with McCloud (Pet. App. 11a-12a).

1400). Petitioner's counsel then agreed with the prosecutor's statement that the portion of the transcript "should be read [to the jury] just as it reads, * * * that was the appropriate portion that dealt with what they asked" (Tr. 1404).[4] The district court thus followed the course of action petitioner had urged. Moreover, although other defendants moved for a mistrial at that point, petitioner did not join that motion (Tr. 1413-1414).[5] Petitioner therefore may not now challenge the district court's decision to reread the transcript to the jury.

In any event, the district court's decision to reread a portion of the testimony was correct and certainly did not rise to the level of an abuse of discretion. See, *e.g.*, *United States* v. *Varsalona*, 710 F.2d 418, 420-421 (8th Cir. 1983); *United States* v. *Nolan*, 700 F.2d 479, 486 (9th Cir.), cert. denied, 462 U.S. 1123 (1983); *Government of the Canal Zone* v. *Scott*, 502 F.2d 566, 570 (5th Cir. 1974). It was entirely reasonable for the court in this case to respond to the jury's request by rereading the portion of the transcript that directly related to the jury's inquiry—McCloud's testimony concerning the "ringer." Add-

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[4] Petitioner's counsel subsequently stated that "if * * * [it was] a universally accepted resolution," he would agree simply to inform the jurors that their question had nothing to do with Chicago and nothing to do with January 20, but that, in the absence of agreement, "my position is that the portions should be read" (Tr. 1406).

[5] Petitioner's counsel did suggest that the district court should "caution the jury * * * that they should consider this [information] together with all of the other evidence" (Tr. 1414), but he did not renew that request when the district court suggested that it would be appropriate to "wait and see what kind of note * * * we get from the jurors" (*ibid.*).

ing other portions of McCloud's testimony might have given undue emphasis to that testimony and might have created the impression that the judge considered the additional testimony important to the question the jury had asked.

Petitioner argues (Pet. 11) that the action taken by the district court failed to eliminate the jury's confusion about whether the ringer came from Chicago or Indiana and whether McCloud's encounter with the ringer took place in early or late January. But the portion of McCloud's testimony reread to the jury made clear that the ringer had arrived from Indiana (Tr. 1411). That testimony also indicated that the events took place "after New Year's Eve," which suggested a time early in January (Tr. 1412).[6]

2. Petitioner argues (Pet. 13-16) that incriminating statements he made during a telephone call to the Skippy Street house were obtained by Deputy Sheriff Peterson in violation of the Fourth Amendment. The court of appeals correctly rejected that claim on the ground that Peterson did not invade petitioner's reasonable expectation of privacy.

In *Hoffa* v. *United States*, 385 U.S. 293 (1966), this Court rejected the defendant's claim that his Fourth Amendment rights were violated by an in-

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[6] Petitioner's reliance (Pet. 12-13) upon *Bollenbach* v. *United States*, 326 U.S. 607 (1946), and its progeny is misplaced. This Court concluded in *Bollenbach* that the defendant's conviction should be reversed because the district court gave an erroneous supplemental instruction regarding a legal principle and the instruction was not harmless error. In the instant case, however, the jury merely sought clarification of a specific portion of McCloud's testimony, and the district court's action in response to the jury's request was entirely proper.

formant's disclosure of his incriminating statements. The defendant in *Hoffa* argued that the informant's "failure to disclose his role as a government informer vitiated the consent that the [defendant] gave to [the informant's] repeated entries into the [hotel] suite, and that by listening to the [defendant's] statements [the informant] conducted an illegal 'search' for verbal evidence" (385 U.S. at 300). This Court observed that the defendant "was not relying on the security of the hotel room [when he made the incriminating statements]; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing" (*id.* at 302). Since the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it," the defendant's Fourth Amendment rights were not violated (*ibid.*). Accord, *United States* v. *Henry*, 447 U.S. 264, 272 (1980); see also *United States* v. *White*, 401 U.S. 745, 749 (1971) (plurality opinion). Thus, when a defendant voluntarily reveals information to another person, the voluntariness of the defendant's action is not vitiated by the fact that he would have withheld the information if he had known that the other party was a government agent.

Petitioner asserts (Pet. 14) that that principle does not apply here because he was "deceived by [Deputy Sheriff] Peterson's untruthful statement that Sweigart was not present" and by Peterson's "implicit statement that Sweigart had reposed trust in Peterson by allowing him to answer the telephone." Even if Peterson's statements amounted to deception, that fact alone would not render Peterson's conduct violative of the Fourth Amendment. For example, it is settled that an undercover agent may employ

deception to gain a suspect's confidence; indeed, the use of undercover agents itself is an example of permissible deception. *Lewis* v. *United States*, 385 U.S. 206 (1966); *Jones* v. *Berry*, 722 F.2d 443, 447-448 (9th Cir. 1983), cert. denied, 466 U.S. 971 (1984) (where undercover agents gained the confidence of a suspect who then voluntarily revealed evidence of crimes, agents did not invade suspect's legitimate expectation of privacy); *United States* v. *Enstam*, 622 F.2d 857, 867-868 (5th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (mere fact that agents concealed their identities and gained entry into the defendant's office under false pretenses did not nullify the defendant's waiver of his Fourth Amendment rights where the defendant asked the agents to participate in the conspiracy).

The proper inquiry is whether petitioner had a reasonable expectation of privacy with respect to the contents of his telephone conversations with Deputy Sheriff Peterson. *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979); *Katz* v. *United States*, 389 U.S. 347 (1967). Petitioner made no effort to discern the identity of the person who answered the telephone. Instead, he voluntarily chose to make a potentially incriminating statement to a person he did not know. As the court of appeals concluded (Pet. App. 9a), it was unreasonable for petitioner to attach an expectation of privacy to a casual exchange with an unknown person at a house petitioner knew to be used as a drug distribution center and frequented by a large and transient group of persons.[7]

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[7] Petitioner asserts (Pet. 14) that Deputy Sheriff Peterson's statement that Sweigart was not present implied that Sweigart had reposed trust in Peterson by allowing him to answer the telephone. However, in a house inhabited by several couples and their friends, and frequented by cocaine buy-

Petitioner's reliance (Pet. 13-14) upon the dissent from the denial of certiorari in *Flaherty* v. *Arkansas*, 415 U.S. 995 (1974), is misplaced. In that case, a government agent obtained incriminating information by answering the defendant's telephone and impersonating the defendant. Justice Douglas observed that "the callers were deceived as to identities of the individuals with whom they were speaking. Trust was not misplaced in [the defendant], who then revealed information or allowed the police to listen in; trust was misplaced in the assumption that an individual identifying himself as [the defendant] was in fact the person known to the callers as [the defendant]" (415 U.S. at 999). In the present case, by contrast, petitioner was not deceived as to the identity of the person answering the telephone; he willingly confided in a stranger whose identity he did not attempt to discern. Petitioner therefore assumed "the risk that his confidence in that individual might be misplaced" (*ibid.* (footnote omitted)). Since this case does not involve any deception relating to the identity of the party answering the telephone, it does not present the situation that troubled the dissenters in *Flaherty*.[8]

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ers and sellers, a response that one of the occupants is not present cannot be equated with a message from the missing occupant that the caller may trust the unidentified person answering the telephone. See Pet. App. 8a-9a.

[8] Moreover, the principal question discussed in the *Flaherty* dissent was whether the agent's action violated the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2511 *et seq.*, an issue not raised by petitioner here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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